Nos. 83-1065, 83-1240.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Brief of the County of Oneida, New York, and the County of Madison, New York, as Petitioners in No. 83-1065.

ALLAN VAN GESTEL,
Counsel of Record,
JEFFREY C. BATES,
F. DENNIS SAYLOR, IV,
GOODWIN, PROCTER & HOAR,
28 State Street,
Boston, Massachusetts 02109.
(617) 523-5700

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Table of Authorities Cited.

CASES.

STATUTES.

MISCELLANEOUS.

The Counties of Madison and Oneida, New York ("the Counties") submit this brief in reply to the briefs filed by the Oneida Indian Nation of Wisconsin and the Oneida Indian Nation of New York ("Brief of Wisconsin-New York Oneidas"), by the Oneida of the Thames Band Council ("Brief of Thames Oneidas"), and by the Solicitor General on behalf of the United States as Amicus Curiae.[1]

Argument.

I. THE ONEIDAS DO NOT HAVE A CAUSE OF ACTION AGAINST THE COUNTIES UNDER FEDERAL LAW.

A. *The Oneidas Do Not Have an Implied Right of Action under the Trade and Intercourse Acts.*

The Oneidas suggest that the analytic approach to be used here in determining whether a right of action should be implied is that set forth in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33 (1916). Brief of Thames Oneidas at 17; Brief of Wisconsin-New York Oneidas at 29-30. It is far too late in the day to suggest that the *Rigsby* approach — which would provide a right of action to virtually anyone who suffered an injury as a result of a statutory violation — should be applied to all statutory enactments which predate *Cort* v. *Ash*, 422 U.S. 66 (1975). *See California* v. *Sierra Club*, 451 U.S. 287, 298-301 (1981) (Stevens, J., concurring). The modern approach, as set forth in cases such as *Daily Income Fund, Inc.* v. *Fox*, 104 S.Ct. 831 (1984), should control.

1. Statutory Framework and Language.

The primary contention of the Oneidas with respect to the actual text of the 1793 Act is based upon *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). The Oneidas argue that, as in *Transamerica*, the 1793 Act rendered noncom-

[1] In consideration of the volume of material already filed with the Court, the Counties do not reply here to all arguments advanced by the Oneidas and the Solicitor General. The Counties do not intend thereby to suggest that they are pursuing any of their arguments with less than complete vigor.

plying conveyances void, and that Congress must have accordingly intended that the issue of voidness could be litigated somewhere. Brief of Wisconsin-New York Oneidas at 27-28; Brief of Thames Oneidas at 24-25.

The 1793 Act, did not, however, render conveyances "void"; it provided that such conveyances would not be of "any validity *in law or equity*" (emphasis added). That phrasing plainly contemplates a lack of enforceability, rather than voidness. Had Congress merely intended to make such conveyances void, it would have been completely unnecessary to have added the phrase "in law or equity" in 1793.[2] Such disabilities were removed by subsequent versions of the Trade and Intercourse Acts, making the conveyances fully valid and enforceable. *See* Brief of Counties at 38.[3]

The Oneidas virtually ignore the other enforcement and relief mechanisms of the 1793 Act, such as the provision giving the President a specific ejectment-like remedy, the provision for informant's suits, and the provisions for criminal penalties. They further ignore the fact that a jurisdictional grant is given only to hear "crimes, offences and misdemeanors," not civil actions. All of the evidence provided by the text of the statute itself points at one conclusion: Congress did not intend to create a private right of action for Indian tribes.

2. Legislative History and Statutory Purpose.

a. LEGISLATIVE HISTORY.

Much is made by the Oneidas of a reply by President Washington on December 29, 1790, to a speech by Cornplanter,

[2] The 1790 Act provided that "no sale [by any tribe] . . . shall be valid" unless made pursuant to the authority of the United States. 1790 Act, § 4. The 1793 Act, in contrast, provided that "no purchase or grant [from any tribe] . . . shall be of any validity in law or equity" unless so made. 1793 Act, § 8. Thus, the 1790 Act focused on the *sale*, which was declared invalid, whereas the 1793 Act focused on the *purchase*, which could not be enforced in a court of law or equity.

[3] The decisions of this Court cited by the Oneidas which held that certain transactions involving Indians were void did not construe language similar to the "no validity in law or equity" clause of the 1793 Act. *See Bunch* v. *Cole*, 263 U.S. 250, 253 (1923) (statute providing that certain leases would be "absolutely null and void"); *Ewert* v. *Bluejacket*, 259 U.S. 129, 135 (1922) (statute providing that "no person employed in Indian affairs shall have any interest or concern in any trade with the Indians"); *United States* v. *Noble*, 237 U.S. 74, 76 (1915) (statute prohibiting lease of allotted lands exceeding specified duration).

a Seneca chief, which is said to constitute legislative history supporting a private right of action. Brief of Wisconsin-New York Oneidas at 26-27; Brief of Thames Oneidas at 28. That reply states in part:

> You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. . . . But it does not appear, from any proofs yet in possession of the Government, that Oliver Phelps has *defrauded* you.
>
> If, however, you have any just cause of complaint against *him*, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.

1 American State Papers, Indian Affairs 139 (1834) (emphasis added). The Senecas' complaint against Mr. Phelps was that he had fraudulently induced them to sell certain land, and that he had failed to pay money owed to them from the sale. Washington's use of the term "defrauded" therefore undoubtedly referred to an action for fraud, not an action for ejectment under the 1790 Trade and Intercourse Act. Washington went on to state:

> you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians. For the particular meaning of this law, I refer you to the explanations given thereof by Colonel Timothy Pickering, at Tioga, which, with the law, are herewith delivered to you.

Id. Colonel Pickering, however, did not believe that Washington's reference to potential redress in the federal courts was an accurate statement of the law. His 1794 memorandum on the speech states:

> See President's Speech Dec. 29, 1790. Mentioning redress to the Indian Nation in the Federal Courts. *Let then provision be made by law to give them redress in our Courts* — & to compel parties to provide for a permanent fulfilment [sic] of engagements, particularly such as that of O.P. [Oliver Phelps] for an annuity perpetual.

62 Pickering Papers 97 (Massachusetts Historical Society, microfilm edition) (emphasis added) (appendix A). Thus, Colonel Pickering's "explanation" of the "particular meaning" of the law, to which Washington deferred, was that tribes had no rights of action in federal court. Taken in its proper context, Washington's reply is simply too slender a reed from which to infer an entire private right of action.

The Oneidas also point to the 1822 enactment of a burden of proof statute as evidence supporting the existence of a private right of action. Act of May 6, 1822, 3 Stat. 682.[4] It provides that in all trials regarding the right of property between an Indian and a "white person", the "white person" has the burden of proof whenever the Indian makes out a presumption of previous possession or ownership. The Oneidas argue that the statute necessarily contemplates litigation enforcing Indian property rights, and that therefore Congress intended to provide a right of action to tribes suing under the 1793 Act.

The Oneidas' contention suffers from a number of serious flaws. First, the views of the 1822 Congress as reflected in that statute are entitled to little, if any, weight in determining whether the 1793 Congress intended to create a private right of action 29 years earlier. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980). Second, as this Court has noted, Congress intended that the 1822 Act should apply only to "disputes arising in Indian country, disputes that would not arise in or involve any of the States." *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667-68 (1979). Thus, the statute literally does not apply to this claim.[5]

[4] That statute was later incorporated into the 1834 Trade and Intercourse Act, and is now codified at 25 U.S.C. § 194.

[5] In addition, of course, a county is not a "white person." *See Leading Fighter* v. *County of Gregory*, 89 S.D. 121, 230 N.W.2d 114 (1975); *see also Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 667-668, 678 (state not a "white person").

More importantly, Congress cannot have intended that tribes could bring federal claims in federal courts, because tribes were not then considered to have capacity to sue, and federal courts were then without jurisdiction to hear claims brought by tribes. *See* Counties' Brief at 20 n.18. If the latter point was at all in doubt in 1822, it was certainly no longer by 1834, after the landmark decision of *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831). Congress must have accordingly believed that the statute would apply in other situations, including at least six types of suits that could have been brought in the early nineteenth century.

First, it could have applied to suits in the territorial courts involving Indians or Indian tribes. The legislative history of § 22 of the 1834 Act (which reenacted the 1822 statute) makes clear that the provision was "intended to apply to the whole Indian country, as defined in the first section." H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834). Indian territory was defined as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished." 4 Stat. 729. *See generally Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 667-68. That definition suggests that the territorial courts operating in those areas would be the only fora in which the statute would apply.[6] Indian plaintiffs could have invoked the statute in these courts for suits over property.[7]

[6] These territorial courts were set up by statutes distinct from those establishing federal courts. *See, e.g.*, Laws of the Territory of Michigan, Act of December 21, 1820, Sheldon & Reed, Detroit p. 313 (1820) (establishing court system); Laws of the Territory Northwest of the River Ohio, Ch. XLIV, Cincinnati (1833) (establishing courts of judicature).

[7] *See* Laws of the Territory of Michigan, *supra*, at 477-78 (Act of June 29, 1821; Indians who bought liquor from any person could seek restoration of the Indian's property given for the liquor "on giving satisfactory proof to any justice of the peace within the territory, that the articles so claimed, are actually the property of the Indian or Indians who make the claim.").

Second, it could have applied to state court suits brought by whites against individual Indians to enforce land sale contracts. Indians were, in the absence of statutes to the contrary, subject to suits in state courts,[8] and the need for the statute to shift the burden of proof was particularly acute in state courts because Indians often lacked the capacity to testify. *See* Committee Report on the 1834 Trade and Intercourse Act, H.R. Rep. No. 474 at 13 (May 20, 1834) ("Complaints have been made by Indians that they are not admitted to testify as witnesses; and it is understood that they are in some States excluded by law"); N.Y. Indian Law, Ch. 420, § 2, p. 576 (1849) (rendering Indians competent witnesses to prove certain violations of the New York Trade and Intercourse Act). Because Indians would normally have the burden of proof on affirmative defenses such as illegality, *see, e.g., Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 189 F.2d 913, 916 (2d Cir. 1951), the statute could operate to shift the burden.

Third, the statute could have shifted the burden of proof on state-based claims brought by individual Indians in state courts. The courts of many states were open to individual Indians, *see Felix* v. *Patrick*, 36 F. 457, 461 (C.C.D. Neb. 1888) (citing the burden of proof statute for the proposition that individual Indians could bring state court actions relating to their land), *aff'd*, 145 U.S. 317 (1892), and Congress had the power to shift the burden of proof in such cases. *See Leading Fighter* v. *County of Gregory*, 89 S.D. 121, 230 N.W.2d 114 (1975) (statute not applied to Indian's suit challenging the tax taking of his land only because the county was not deemed a white person).

Fourth, the statute could have applied to informant's suits under the Trade and Intercourse Acts brought by individual Indians in either state or federal court.[9]

[8] *Plummer* v. *Hubbard*, 201 N.Y. Supp. 747, 749, 207 App. Div. 29 (1923) ("In the absence of federal statute or existing treaty, or state statute, a state court has jurisdiction of an action on contract in favor of a white man against an Indian belonging to a tribe and a particular reservation"); *Bem-Way-Bin-Ness* v. *Eshelby*, 87 Minn. 108, 91 N.W. 291 (1902); *Stacy* v. *LaBelle*, 99 Wis. 520, 75 N.W. 60 (1898); *Stevenson* v. *Christie*, 64 Ark. 72, 42 S.W. 418 (1897).

[9] At common law, suits for penalties were often prosecuted by informants, and the right of informants to bring such suits (also known as *qui tam* actions) is recognized in federal statutes. *United States* v. *Stocking*, 87 F. 857, 861 (D. Mont. 1898). *See, e.g., Adams* v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) (informant's suit against slave trade); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) (*qui tam* action for fraud on the government). Indians were clearly entitled to bring informant's suits under the provisions of § 12 of the 1793 Act, now codified at 28 U.S.C. § 201. See *United States ex rel. Hornell* v. *One 1976 Chevrolet*, 585 F.2d 978 (10th Cir. 1978); *United States ex rel. Chase* v. *Wald*, 557 F.2d 157 (8th Cir.), *cert. denied*, 434 U.S. 1002 (1977); *United States ex rel. Whitehorse* v. *Briggs*, 555 F.2d 283 (10th Cir. 1977).

Fifth, the statute could have applied to suits on state claims by individual Indians which were brought in federal court under pendent jurisdiction. *See Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824). For example, if an Indian had brought a federal court informant's action relating to tribal land, and had added a state-based fraud claim to rescind the sale of his private reserved land, the statute would have shifted the burden of proof on the personal claim as well as on the informant's action.

Finally, the statute could have applied to suits brought by the United States or some other governmental body on behalf of Indians. The statute does not require that an Indian be a party in order for it to operate; rather, it applies to suits where Indians "may" be a party. Because an Indian might be a party as an informant, the statute might apply to suits under the Trade and Intercourse Acts brought by the United States. Similarly, New York had a statute authorizing ejectment actions against non-Indians on Indian lands. New York Indian Law, c. 234, § 8 (1841); *see Johnson* v. *Long Island R. Co.*, 162 N.Y. 462, 56 N.E. 992 (1900). Such actions could only be brought "by the district attorney of the county, or in the name of the nation, tribe or band, by any three of the chiefs, head men, or councilors thereof." *Johnson, supra*, 56 N.E. at 993. Because here, too, Indians *could* be parties, the statute might shift the burden of proof in state actions brought on their behalf.

b. STATUTORY PURPOSE.

Citing authority such as *United States* v. *Candelaria*, 271 U.S. 432, 441 (1926), the Oneidas maintain that the purpose of the 1793 Act was to prevent the improvident disposition of

tribal land in order to prevent Indians from becoming "homeless public charges." Brief of Wisconsin-New York Oneidas at 25-26.[10] Such an interpretation would have undoubtedly astonished the members of the Second Congress. In 1793, most Indian tribes were powerful and bellicose entities, potentially subject to the influence of the British, French, and Spanish; they were *not* helpless wards confined to meager allotments. Congress desired to avoid destructive retaliations by the frontier tribes and, more importantly, to prevent an all-out war which could devastate the struggling new nation. F. Prucha, American Indian Policy in the Formative Years 36, 44, 48 (1962). The Trade and Intercourse Acts were believed to be the most prudent and reasonable means of keeping the peace. *Id.* at 44-48. Any other intepretation of the purpose of the 1793 Act simply substitutes modern attitudes for historical fact.[11]

3. Adequacy of Express Remedies to Serve the Legislative Purpose.

The Oneidas contend that "tribal suits are essential to effectuate the protective purpose of the [1793] Act," because otherwise "tribes have no sure means of recovering possession of lands lost in violation of the Act." Brief of Wisconsin-New York Oneidas at 30. That argument assumes that the prevention of the sale of tribal lands was a purpose unto itself, rather than a means of preserving peace along the Indian frontier. In

[10] *United States* v. *Candelaria* involved the 1834 Act, not the 1793 Act. This Court has suggested elsewhere that the purpose of the Acts may have evolved over the years. *See Wilson* v. *Omaha Indian Tribe*, *supra* 442 U.S. at 664 ("*a* major purpose of these Acts *as they developed* was to protect the rights of Indians to their properties") (emphasis added). It cannot be disputed, however, that the aim of the 1793 Act was solely the preservation of peace, regardless of whatever purpose may have been served by the 1834 Act.

[11] The Oneidas' argument that they are a benefited class under the 1793 Act is premised entirely upon the assumption that the Second Congress intended to prevent land sales in order to protect the Indians from their own improvidence. As noted above, that assumption is without historical support. The 1793 Act was designed to preserve the peace, and accordingly was intended to benefit the public as a whole. Even if Congress intended to benefit tribes as a means of achieving its ultimate goal, it is unnecessary to imply a right of action on their behalf when other parties are given authority to vindicate tribal rights. *See Daily Income Fund, Inc.* v. *Fox*, *supra*, 104 S.Ct. at 841.

fact, as set forth in the Counties' Brief at 23, the remedies expressly set forth in the 1793 Act — including the ejectment-like remedy provided to the President — were specifically directed to the legislative object of preventing hostilities and confrontations between Indians and settlers, and should not be added to by this Court.[12]

B. *The Oneidas Do Not Have a Cause of Action under Federal Common Law.*

Notwithstanding several pages of argument, the Oneidas are unable to come up with a single decision of this Court authorizing a federal common law cause of action by an Indian tribe for trespass damages or ejectment. If such an action does not now exist, it must be created; and before it may be created, the Court must consider all of the restraints imposed by the rule of *Erie R.* v. *Tompkins*, 304 U.S. 64 (1938). *See* Counties' Brief at 25-27. Much more significantly, however, any such right of action has long since been preempted by the 1793 Act.

The Oneidas make a number of points in their argument that the 1793 Act had no preemptive effect. First, they contend that the 1793 Act was not substantively different than the 1790 Act, and accordingly the addition of new penalties and remedies in 1793 did not preempt any common law right of action. Brief of Wisconsin-New York Oneidas at 18. That argument cannot withstand analysis. The 1790 Act contained no penalties whatsoever for persons who violated the land sales strictures of § 4. The 1793 Act, in contrast, provided that (a) persons who illegally negotiated treaties were subject to criminal penalties, (b) persons who illegally settled on Indian land were subject to criminal penalties, and (c) persons who illegally settled on Indian land were subject to discretionary removal

[12] Indeed, it requires a fanciful view of history even to suggest that civil remedies were relevant to accomplish the purposes of the 1793 Act. It is beyond dispute that the 1793 Act was intended, at least with respect to land matters, to address the situation on the frontier. By definition, this area was the least organized and most chaotic area subject to congressional jurisdiction. It would have seemed ludicrous to Congressmen, frontiersmen, and Indians alike to suggest that a trespasser could be ejected by means of a civil suit initiated by an Indian tribe. *See Beck* v. *Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30, 37 (8th Cir. 1884) (noting common view that ejectment was a "barren remedy" on the frontier).

by the President. 1793 Act, §§ 5, 8. Those provisions were specifically selected by Congress in order to further the delicate peace-keeping function and to ensure, as James Madison stated, "that this whole business should be under the absolute and sole discretion of the public authority." Counties' Brief at 23. The Oneidas now seek to create an additional option: (d) persons who illegally settled on Indian lands were subject to trespass damages in private suits. That option is foreclosed by the preemptive effect of the carefully tailored scheme chosen by Congress. *See Smith* v. *Robinson*, 104 S.Ct. 3457, 3470 (1984).

The Oneidas' second contention as to preemption is somewhat curious, to say the least. The Oneidas argue that the 1793 Act "did not speak directly to the issue of *tribal* remedies," and therefore the Act did not preempt any such remedies. Brief of Wisconsin-New York Oneidas at 19 (emphasis added); *accord*, Brief of Thames Oneidas at 14. In other words, the Oneidas maintain that there were two possibilities: either Congress could have specifically provided for tribal remedies (and thus they would be available) or Congress could have *not* specifically provided for tribal remedies (and thus they would be available because they were not preempted). Under that theory, Congress would be required to specifically negate the existence of tribal remedies, by providing, for example, that "no tribe may bring suit under this act." The preemption doctrine has never been read so narrowly by any court.

Finally, the Oneidas are reduced to arguing that the 1793 Act does not match up in length and breadth against the 1972 statute under consideration in *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). Brief of Wisconsin-New York Oneidas at 20-22. As noted in the Counties' Brief at 30, this Court has given preemptive effect to modern statutes much less sweeping then the 1793 Act. Moreover, the comprehensiveness of a statute enacted in the 1700's cannot be measured by the standards of 1984, but must necessarily be read in the context of the day; in fact, the Trade and Intercourse Act of 1793 was one of the most elaborate statutes enacted by the early Congress. Counties' Brief at 29-30.[13] That Act was plainly intended to be the sole source of remedial authority for illegal settlement on Indian land.

II. The Oneidas' Claim Is Barred by the Applicable Statute of Limitations.

The basic contention of the Oneidas on the limitations issue may be simply stated: no federal statute of limitations applies to this claim; no state statute of limitations may be borrowed, because to do so would be "inconsistent" with federal Indian policy; therefore no statute of limitations of any kind applies; and therefore this claim may be brought notwithstanding the passage of nearly two centuries.

Perhaps because they realize that it would be "utterly repugnant" to our legal system to allow a claim to languish forever without being subject to a time bar, *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805), the Oneidas have cast about for some congressional imprimatur for their theory. They have focused upon a handful of statutes, principally 28 U.S.C. § 2415.

A. *The Incorporation of a State Statute of Limitations Would Not Be Inconsistent with Federal Indian Policy.*

It is well-settled that, in the absence of a controlling federal statute of limitations, federal courts should ordinarily borrow analogous state limitations periods. *DelCostello* v. *Teamsters*,

---

[13] The Thames Oneidas maintain that the act is not comprehensive because it does not address the question of enforcement by tribes, states, or land companies. Brief of Thames Oneidas at 14. The simple answer to that point is that Congress did not intend that *any* party other than the United States should have enforcement powers. *See Block* v. *Community Nutrition Institute*, 104 S.Ct. 2450, 2455 (1984) (although statute was enacted in part to benefit consumers, consumers had no standing when other parties were given specific rights under legislative scheme). The failure to specifically mention the building of roads, the grazing of livestock, or the like is not remarkable, for those activities are but particularized forms of settlement and trespass.

103 S.Ct. 2281, 2287 (1983).[14] The only exception potentially applicable here is that federal courts may not apply state statutes which are "inconsistent" with federal law or policy. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977).

The Wisconsin and New York Oneidas offer but a single potential "inconsistency": the application of a state statute "would effectively enable the Counties to claim title to Oneida lands without the requisite federal consent." Brief of Wisconsin-New York Oneidas at 42. The Thames Oneidas make a similar argument: "The application of a state statute of limitations would significantly undermine this policy of federal protection [of Indian lands], by permitting a violation of the Act to go unremedied." Brief of Thames Oneidas at 37.

In other words, according to the Oneidas, the application of a state statute of limitations would be "inconsistent" with federal Indian policy because it would bar the claim, and thereby cause them to lose the litigation. That argument is absurd on its face, and has been specifically rejected by this Court. *See Board of Regents* v. *Tomanio*, 446 U.S. 478, 488 (1980).

The Thames Oneidas go on to make an additional argument: "The borrowing of state law here would also frustrate the strong federal policy of maintaining uniform national rules governing disposition of Indian land." Brief of Thames Oneidas at 37. More properly stated, the question is whether there is any compelling need for a nationally uniform statute of limitations governing property claims such as this. That inquiry is controlled by the three factors set forth in *Wilson* v. *Omaha Indian Tribe, supra*, 442 U.S. at 672-74.

First, as in *Wilson*, there is no reason "why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law." *Id.*, 442 U.S. at 673. While the states may differ among themselves, all claims against property owners in New York State will be treated

[14] Lawsuits brought to vindicate important federal rights are, of course, routinely governed by borrowed state limitation periods. *See, e.g., Burnett* v. *Grattan*, 104 S.Ct. 2924 (1984) (civil rights).

identically. Second, "there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests." *Id.* Such an "injury" would occur only where a tribe has waited too long to sue; even in such a case, the United States retains the power to institute remedial litigation on its behalf should such an action prove necessary to vindicate significant federal interests. Additionally, as the *Wilson* court noted, there is no question of "hostile and unfavorable treatment at the hands of state law," for "the legal issues are federal and the federal courts will have jurisdiction to hear them." 442 U.S. at 673-74. Finally, this is "an area in which the States have substantial interest in having their own law resolve controversies such as these." 442 U.S. at 674. As the Court stated, "private landowners rely on state real property law when purchasing real property," and the security of their titles should not depend on the vagaries of being within the boundaries of one or another ancient Indian treaties. *Id.*

The Oneidas offer no other actual or potential "inconsistencies" precluding the incorporation of state limitation periods. Furthermore, as noted in the Counties' Brief at 35 n.28, there is a strong countervailing federal policy favoring repose, particularly where titles to real estate are involved. That policy, in the case of a lawsuit that is two centuries old, must surely overwhelm any policy demanding the application of uniform statutes of limitation to Indian claims.

B. *There Is No Evidence that Congress Intended to Preclude the Incorporation of State Statutes of Limitations to Claims Brought by Indian Tribes.*

In their search for some congressional endorsement of their theory that no statute of limitations applies to this claim, the Oneidas have identified three separate statutes: 28 U.S.C. § 2415, 25 U.S.C. § 233, and 28 U.S.C. § 1362.

28 U.S.C. § 2415 provides a statute of limitations in certain actions brought by the United States.[15] When first enacted in

[15] The Wisconsin and New York Oneidas inexplicably maintain that the present version of 28 U.S.C. § 2415 *specifically* provides that claims brought by tribes are governed by the same statute of limitations as the United States. Brief of

1966, it did not contain any reference to suits brought on behalf of Indian tribes. Act of July 18, 1966, Pub.L. 89-505, 80 Stat. 304. It was amended in 1972 — two years after the institution of this suit — to include a limitation period for certain claims brought on behalf of Indian tribes. Act of July 18, 1972, Pub.L. 92-353, 86 Stat. 499. Congress extended that limitation period in 1977 and 1980. Act of July 11, 1977, Pub.L. 95-64, 91 Stat. 268; Act of March 27, 1980, Pub.L. 96-217, 94 Stat. 126. Finally, in 1982, Congress enacted an elaborate limitation mechanism which sought to cut off certain claims which could have been brought by the United States on behalf of Indian tribes. Act of Dec. 30, 1982, Pub.L. 97-394, 96 Stat. 1976.[16]

That statute, however, has *never* contained any reference to actions *brought by tribes themselves*. As the statutory history indicates, Congress was very much aware that the statute did not apply to claims brought by tribes. *See* Counties' Brief at 32-33. It is therefore plain, absolutely beyond argument, that Congress did not intend 28 U.S.C. § 2415 to apply to such claims. The Counties are unable to comprehend how the Oneidas could possibly maintain that a statute which Congress did *not* intend to apply to claims brought by tribes should be *applied* to such claims in order to further congressional intent.

Indeed, to the extent Congress' intent in enacting § 2415 is relevant at all, it works against the Oneidas' theory. By deliberately omitting suits brought by tribes themselves, Congress must have intended that such suits be governed by either (a) another federal statute of limitations, (b) no statute of limitations at all, or (c) state statutes of limitations, borrowed as a matter of federal law. The first possibility is easily eliminated: there is no relevant federal statute. It is very unlikely Congress intended the second; it would make the entire limitations

Wisconsin-New York Oneidas at 39-40. That position is without any textual support whatsoever. Even the Thames Oneidas do not claim that § 2415 literally applies, but only that it is an indication of congressional "policy." Brief of Thames Oneidas at 39.

[16] The attention given to the 1982 Act tends to obscure the fact that this lawsuit was filed on February 5, 1970. The question, of course, is whether this claim was barred, as of the day it was filed, under the then-existing state of the law. A statute enacted a dozen years later is of limited value, at best, in ascertaining the law in 1970.

mechanism, enacted in 1982 in order to provide a measure of finality to Indian land claims, nothing but a meaningless charade. Furthermore, it would run counter to the long-established principle that all claims should be subject to some limitation period, a principle of which Congress must be presumed to be aware. *See Adams* v. *Woods, supra*. Congress accordingly should be presumed to have intended that claims brought by tribes should be subject to borrowed state limitation periods.[17]

The second statute cited by the Oneidas is 25 U.S.C. § 233. That statute, as noted in the Court's 1974 opinion in this case, was intended to provide New York with civil jurisdiction in certain actions involving Indians. 414 U.S. at 679-82. In order to ensure that disputes between Indians and New York over rights to land would remain in a federal forum, and to ensure that the grant of jurisdiction would not operate retrospectively, the following proviso was added:

> Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

See 414 U.S. at 680-82. The Counties do not suggest that § 233 should be construed to make the laws of New York applicable to this action. Rather, they contend that a state limitation period should be borrowed and incorporated as a matter of federal law in the absence of a controlling federal statute of limitations. The legal issues remain federal, and

[17] The Solicitor General suggests that § 2415 should be applied to claims brought by tribes for two reasons: first, because the "same underlying claim" is involved whether the United States or a tribe sues, and second, because the United States and a tribe, working in "close coordination," would arrive at the same conclusion in considering whether to sue, and thus no repose would be achieved. Brief of United States at 22. Both arguments are premised on the dubious notion that the United States government and small groups of Indians (who stand to gain billions of dollars if they are ultimately successful) should be treated exactly the same. The second argument, of course, is further belied by the fact that the United States specifically declined to prosecute this action, as appropriate proceedings were pending before the Indian Claims Commission. (Jt. App. at 42a-44a).

federal courts have jurisdiction to hear them. *See Wilson* v. *Omaha Indian Tribe, supra,* 442 U.S. at 673-74.[18]

Finally, the Oneidas cite 28 U.S.C. § 1362 for the proposition that "tribal claims should be treated the same as suits filed by the United States [*i.e.*, governed by 28 U.S.C. § 2415] with respect to the applicable statute of limitations." Brief of Wisconsin-New York Oneidas at 40. Section 1362 provides *subject matter jurisdiction* for suits brought by Indian tribes. As the House Judiciary Committee Report accompanying its passage noted,

> The district courts now have jurisdiction over cases presenting Federal questions brought by the tribes when the amount in dispute exceeds $10,000. Enactment of this bill would merely authorize the additional jurisdiction of the court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount.

H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3145, 3146.

While the effect of § 1362 was to provide Indian tribes with the same jurisdictional access to federal court as the United States, *see Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 472-73 (1976), that section was hardly intended to mean that all references in the United States Code to "the United States" should be read to mean "the United States or an Indian tribe." 28 U.S.C. § 2415 is a statute of limitations, having nothing to do with subject matter jurisdiction, and § 1362 is absolutely irrelevant to its interpretation and effect.

As this Court stated in *DelCostello* v. *Teamsters, supra,* 103 S.Ct. at 2287, 2289, even in cases where it would be inappropriate to borrow state statutes of limitation, the correct procedure is to employ either another federal limitation or an

[18] The remarks of Rep. Morris, cited by the Oneidas, merely indicate that § 233 was not intended to destroy any preexisting rights an Indian tribe may have had. The statute could not, of course, revive a cause which had already expired prior to its adoption. *Stewart* v. *Keyes,* 295 U.S. 403, 417 (1935).

The debate in the Congressional Record further indicates that § 233 was intended to affect only one tribe, the Senecas. 96 Cong. Rec. 12453, 12455 (Aug. 14, 1950). Congress thus apparently did not believe in 1950 that the Oneidas could ever become a recognized tribe in New York, and therefore § 233 is further evidence that Congress intended to ratify prior sales in New York by the Oneidas.

alternative such as laches.[19] It is manifestly unjust to hold that a private claim should be without any limitation whatsoever, and doubly so when the effect is to preserve a claim that is two centuries old.

III. The United States Subsequently Ratified the 1795 Conveyance to New York.

A. *Federal Ratification of Indian Land Conveyances Need Not Be "Plain and Unambiguous," But May Be Implied.*

The Oneidas, relying entirely on this Court's opinion in *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), argue that congressional intent to extinguish Indian property rights must be expressed plainly and ambiguously, and that therefore ratification of the 1795 conveyance may not be implied.

The relevant portion of *Santa Fe Pacific* involved an 1865 statute enacted by Congress for the purpose of creating a reservation for the Walapai tribe. 314 U.S. at 351-54. As the Court specifically noted, the tribe had not entered into any agreement of any kind regarding its land, nor had any treaty been proposed; Congress had acted unilaterally, without the knowledge or consent of the Walapais, in establishing a reservation. The Court held that the creation of such a reservation would not operate as an extinguishment of all Walapai property rights outside the reservation without plain evidence that Congress intended such a result. *Id.* The Court went on to hold, however, that the voluntary acceptance by the tribe, in 1883, of a military reservation created by executive order *did* implicitly constitute a release of tribal property rights outside the reservation. 314 U.S. at 358.

Thus, the *Santa Fe Pacific* court simply held that a unilateral congressional enactment, undertaken without the participation or consent of a tribe, would be subjected to close scrutiny before it would be found to extinguish Indian title. It also held,

[19] The Solicitor General cites *Ewert* v. *Bluejacket,* 259 U.S. 129, 138 (1922), for the proposition that statutes of limitation do not apply to Indian tribes. *Ewert* involved the application of laches to an individual Indian, not the application of a statute of limitations to a tribe. In any event, *Ewert* is not controlling for the reasons set forth in the brief of amici City of Escondido, *et al.*, at 22-24.

however, that in some circumstances Indian title could be implicitly extinguished. The issue here is whether Congress implicitly intended to ratify a voluntary sale of tribal land undertaken with the participation and consent of the tribe. There is no reason in law or policy why such ratification should be measured by the strictest possible standard, instead of by a common-sense inquiry: what result did Congress intend? That kind of pragmatic analysis is frequently undertaken by this Court in actions involving title to Indian land, *see, e.g., Solem* v. *Bartlett,* 104 S.Ct. 1161 (1984), and it should similarly be undertaken here.

B. *The 1795 Conveyance Was Impliedly Ratified by the United States.*

The points raised by the Oneidas in opposition to the Counties' ratification argument on the merits are adequately addressed in the Counties' Brief at 41-44, and in the various briefs filed by amici, Brief of American Land Title Association at 5-11; Brief of C.H. Albright *et al.* at 16-23. The Counties wish only to add the following in response to a point raised by the Solicitor General.

The Solicitor General argues that the Treaty of Buffalo Creek of 1838 between the Oneidas and the United States is an additional "consideration," not raised by the Counties, which might "limit or even bar relief in future cases." Brief of United States at 30. The Counties agree that the 1838 treaty is relevant consideration; it is further evidence of implicit congressional ratification of the 1795 transfer, and all other transfers involving the Oneidas that may not have complied with the Trade and Intercourse Acts. Regardless of whatever Congress may have intended prior to that time, it is obvious that by 1838 Congress intended that *all* Indian title in New York held by the Oneidas should be completely, and permanently, extinguished.

The Solicitor General, however, offers the Treaty of Buffalo Creek as evidence of the Oneidas' *implicit* relinquishment of the subject land, rather than as evidence of congressional ratification. The Counties agree emphatically with the Solicitor General that Indian title may be implicitly extinguished, and that the Oneidas long ago relinquished title to the subject land;

they join in his apparent invitation to the Court to hold that the Treaty of Buffalo Creek constitutes evidence of such relinquishment.[20] The Counties note, however, that the Solicitor General's implicit extinguishment argument cannot possibly be reconciled with his argument that Indian title may only be extinguished by a "plain and unambiguous" act of Congress.

IV. The Oneidas' Claim Should Be Barred on Equitable Grounds.

The Solicitor General further argues that "equitable considerations" may operate to limit the claims of the Oneidas in future litigation. Brief of United States at 33. The "equitable considerations" in question are not identified, but are presumably based upon the gross injustice of depriving innocent persons of their property, and forcing them to pay trespass damages, after two centuries of good faith occupation.

Again, the Counties welcome the support of the Solicitor General, but find certain aspects of his argument difficult to comprehend. The Solicitor General first argues that "equitable considerations" could be used to "inform the court's judgment" in fashioning relief. Brief of United States at 34. That is nothing more than a suggestion that the District Court should not utilize all of the weapons in its arsenal of remedial powers — a suggestion which, unfortunately, is not backed by any rule of law. Would it be within the sound discretion of a District Court to rule that the party which holds title to the land is also entitled to possession? Or that a trespasser should pay trespass damages? If so, is the Solicitor General arguing anything more than that the landowners should simply plead for mercy? What recourse do the landowners have if that mercy is not forthcoming?

More intriguing questions are posed by the manner in which the Solicitor General has framed his argument. If equity should limit the remedy, why should it not bar the right altogether? What principle provides that equity applies in one instance

[20] The Court is not precluded from deciding issues not addressed in the Court of Appeals or in the petition for certiorari. *See Carlson* v. *Green,* 446 U.S. 14, 17 n.2 (1980).

and not the other? Perhaps sensing the difficulties of that position, the Solicitor General goes on to argue that "[i]n extreme circumstances, it is arguable that equitable considerations might even wholly bar relief in a suit by an Indian tribe, even though they would not in a suit by the United States." Brief of United States at 36 (citations omitted). What sort of equity applies only in "extreme circumstances," and not otherwise? What *are* "extreme circumstances," if centuries-old claims affecting thousands of innocent persons do not qualify? If the Oneidas are subject to equitable defenses, but the United States is not, how can that be reconciled with the argument that Indian tribes and the United States are to be treated exactly the same with respect to litigating these claims? How can that "principle" be *controlling* as to statutes of limitation (Brief of United States at 21), and *irrelevant* as to laches?

The Solicitor General's attempts to appear reasonable, while supporting the claims of the Oneidas, have led him into a deep quagmire of inconsistency and illogic. This Court does not need, however, to attempt to find any coherency in that argument. While the Counties welcome the entry of any equity into this litigation — an event that can only operate to their benefit — they respectfully submit that the Court has more than ample grounds on which to reverse the judgment below, without needing to issue advisory opinions on the potential applicability of equitable defenses.

Conclusion.

For the foregoing reasons, and for the reasons urged in the Counties' principal brief, the judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the Counties, should be reversed.

Respectfully submitted,

ALLAN VAN GESTEL,
Counsel of Record,
JEFFREY C. BATES,
F. DENNIS SAYLOR, IV,
GOODWIN, PROCTER & HOAR,
28 State Street,
Boston, Massachusetts 02109.
(617) 523-5700

Dated: September 21, 1984

1. Encroachments & unfair Purchases.

Answer. Imperfection of the Genl Govt - Like Encroachments and unfair purchases under the Royal Govt to put an end to these, Sir W. Johnston held a treaty at Fort Stanwix in 1768. & drew a new line, including them all - to put an end to disputes. - The US States will now do the same - & prevent future ones. - But these arise from the imprudence of the Indians themselves. - Either for behoves them to consider in what manner they will suffer future purchases to be made - to secure them from imposition

2. Path along the Lake.

A. Have the British, on their side, left a path along the Lake?
No. Why then demand it of the US States?

3. For injuries done the US. in the late war, never compensated, viz. by cession of some of their lands - between the termination of Wyoming - Schoharie &c. The Indians themselves being the Aggressors, having unprovoked engaged in the war. - Devastations extended to the U. branch of Susquehanna, the N.W. & W. parts of Pennsylvania - thousands of families ruined & many lives taken or endangered.

4. In using belts & strings - often one for events distinct subject. Perhaps where there are many subjects of speech, the number of strings, or distinct marks might correspond with the number of the subjects in the order of delivery.

5. [Did not the Five Nations receive a large sum of money from the British to indemnify them for their loss in the war with America?]

6. See President's speech Dec: 29. 1790. Mentioning redress to the Indians vexations in the Federal Courts. Let them provision be made by law to give them redress in our Courts - & to compel parties, to provide for a permanent fulfilment of engagements particularly such as that of G.B. for an annuity perpetual.
[William Shaler]